Wu Sor Hwa & Ors v Dato' Sri Dr Abdullah Fadzil bin Che Wan & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-352–10 OF 2016
ADLIN ABDUL MAJID J
21 FEBRUARY 2025

Companies and Corporations — Shares — Sale of shares — Transfer of share to third parties without written consent of plaintiff — Claim for damages — Whether defendants acted contrary to clauses of shareholder's agreement ('agreement') — Assessment of damages — Whether nominal damages ought to be awarded — Whether damages arose directly as consequence of breach agreement — Whether there was direct causal connection between breach committed by defendants with damages suffered by plaintiffs — Whether damages suffered by plaintiffs within reasonable contemplation of parties

The plaintiffs claimed that the defendants had breached a shareholders' agreement ('shareholders' agreement'), which was executed between the first plaintiff, the third plaintiff and the first to fourth defendants. The shareholders' agreement governed their relationship as shareholders of the fifth defendant. The alleged breach was, amongst others, that the first to fourth defendants had transferred the shares in the fifth defendant ('impugned shares') to the sixth defendant without the plaintiffs' consent and in breach of the right of first refusal provided for under the shareholders' agreement. Having found that there had been a breach of the shareholders' agreement as the impugned shares were transferred without the consent of the plaintiffs, the court awarded in favour of the plaintiffs ('judgment'). The plaintiffs then applied to this court for damages to be assessed.

Held, awarding general damages of RM144,322,499 to plaintiffs:

(1) If the agreement was not breached, the plaintiffs would have been given the first right of refusal and would have been able to purchase the impugned shares on or around 18 May 2016. As such, to put the plaintiffs in a position as close as possible as if the agreement was not breached, the plaintiffs should be entitled to damages calculated in the following manner: (a) the value of the impugned shares on 18 May 2016, the date when the shares were transferred to the sixth defendant; LESS; (b) the price paid by the sixth defendant for the transfer on 18 May 2016, which would have been the consideration paid by the plaintiffs for the impugned shares had the shares been transferred to the plaintiffs; LESS;

and (c) the value of the impugned shares on 28 February 2019, being the date the impugned shares were transferred to the plaintiffs pursuant to the judgment (see paras 12–13).

(2) General damages awarded to the plaintiffs could be fairly calculated in the following manner: (a) the value of the fifth defendant as at 18 May 2016 (RM200m) x 75% (the percentage of the impugned shares in the fifth defendant) = RM150m; (b) less the price the impugned shares were transferred to the sixth defendant on 18 May 2016, which was the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them (RM5,677,500); and (c) less the value of the impugned shares as at 28 February 2019 (the nominal value of RM1, based on the finding that the fifth defendant was valued nominally at RM1). The calculation resulted in an amount of damages of RM144,322,499 (see paras 25–26).

(3) The court was unable to agree with the first to fourth defendants' arguments that nominal damages should be awarded. The argument was irrelevant to the issue of the calculation of general damages due to the plaintiffs and ignored the implication of the breach, which was that the impugned shares were not first offered to the plaintiffs. Whether the transfer was via a share swap or otherwise, under the shareholders' agreement, the first to fourth defendants were obligated to offer shares to the plaintiffs before the shares could be transferred to a third party. Had the shares been offered to the plaintiffs, the plaintiffs would have been able to purchase the shares. Hence, damages to be awarded must reflect a scenario in which the impugned shares had been purchased by the plaintiffs on or around 18 May 2016 (see paras 27–28).

(4) The court agreed to the second argument raised, namely, that the damages sought do not satisfy the remoteness test and stressed that the plaintiffs must be able to show a causal connection between the breach and the damages suffered. On the facts of the case, the measure of damages that would arise directly from the breach would be the value of the impugned shares that the plaintiffs would have been able to purchase on 18 May 2016 (instead of 28 February 2019). These damages arose directly as a consequence of the first to fourth defendants' breach of the shareholders' agreement. There was, therefore, a direct causal connection between the breach committed by the first to fourth defendants in not offering the impugned shares to the plaintiffs, with the damages suffered by the plaintiffs. Further, the damages suffered by the plaintiffs would have been within the reasonable contemplation of the parties when they entered into the shareholders' agreement (see paras 29–30 & 32).

[Bahasa Malaysia summary

Plaintif menuntut bahawa defendan telah melanggar perjanjian pemegang saham ('perjanjian pemegang saham') antara plaintif pertama, plaintif ketiga dan defendan pertama hingga keempat. Perjanjian pemegang saham tersebut mengawal selia hubungan mereka sebagai pemegang saham defendan kelima. Pelanggaran yang dikatakan adalah, antara lain, bahawa defendan pertama hingga keempat telah memindahkan saham dalam defendan kelima ('saham yang dipertikaikan') kepada defendan keenam tanpa persetujuan plaintif dan melanggar hak penolakan pertama yang diperuntukkan di bawah perjanjian pemegang saham tersebut. Setelah mendapati bahawa terdapat pelanggaran perjanjian pemegang saham kerana saham yang dipertikaikan telah dipindahkan tanpa persetujuan plaintif, mahkamah memihak kepada plaintif ('penghakiman tersebut'). Plaintif kemudian memohon kepada mahkamah ini untuk pentaksiran ganti rugi.

Diputuskan, membenarkan gantirugi am sebanyak RM144,322,499 kepada plaintif-plaintif:

(1) Jika perjanjian itu tidak dilanggar, plaintif mempunyai hak penolakan pertama dan akan dapat membeli saham yang dipertikaikan pada atau sekitar 18 Mei 2016. Oleh itu, untuk meletakkan plaintif dalam kedudukan sedekat mungkin seolah-olah perjanjian itu tidak dilanggar, plaintif harus berhak mendapat ganti rugi yang dikira dengan cara berikut: (a) nilai saham yang dipertikaikan setakat 18 Mei 2016, tarikh apabila saham dipindahkan kepada defendan keenam; KURANG; (b) harga yang dibayar oleh defendan keenam untuk pemindahan setakat 18 Mei 2016 yang akan menjadi balasan yang perlu dibayar oleh plaintif untuk saham yang dipertikaikan sekiranya saham itu dipindahkan kepada plaintif; KURANG; dan (c) nilai saham yang dipertikaikan setakat 28 Februari 2019, iaitu tarikh saham yang dipertikaikan dipindahkan kepada plaintif menurut penghakiman tersebut (lihat perenggan 12–13).

(2) Ganti rugi am yang diberikan kepada plaintif boleh dikira secara adil dengan cara berikut: (a) nilai defendan kelima setakat 18 Mei 2016 (RM200m) x 75% (peratusan saham yang dipertikaikan dalam defendan kelima) = RM150m; (b) ditolak harga saham yang dipertikaikan telah dipindahkan kepada defendan keenam pada 18 Mei 2016 iaitu balasan yang akan dibayar oleh plaintif untuk saham yang dipertikaikan sekiranya saham tersebut dipindahkan kepada mereka (RM5,677,500); dan (c) ditolak nilai saham yang dipertikaikan setakat 28 Februari 2019 (nilai nominal RM1, berdasarkan penemuan bahawa defendan kelima dinilai secara nominal pada RM1). Pengiraan itu menjadikan jumlah ganti rugi sebanyak RM144,322,499 (lihat perenggan 25–26).

(3) Mahkamah tidak dapat bersetuju dengan hujahan defendan pertama hingga keempat bahawa ganti rugi nominal harus diberikan. Hujahan itu tidak relevan dengan isu pengiraan ganti rugi am yang disebabkan oleh plaintif dan mengabaikan implikasi pelanggaran itu, iaitu saham yang dipertikaikan tidak terlebih dahulu ditawarkan kepada plaintif. Sama ada pemindahan itu melalui pertukaran saham atau sebaliknya, di bawah perjanjian pemegang saham, defendan pertama hingga keempat bertanggungjawab untuk menawarkan saham kepada plaintif sebelum saham boleh dipindahkan kepada pihak ketiga. Sekiranya saham ditawarkan kepada plaintif, plaintif akan dapat membeli saham tersebut. Oleh itu, ganti rugi yang akan diberikan mesti mencerminkan situasi di mana saham yang dipertikaikan telah dibeli oleh plaintif pada atau setakat 18 Mei 2016 (lihat perenggan 27–28).

(4) Mahkamah bersetuju dengan hujahan kedua yang dibangkitkan, iaitu ganti rugi yang dituntut tidak memenuhi ujian luar duga ('remoteness') dan menekankan bahawa plaintif mesti dapat menunjukkan hubungan perkaitan antara pelanggaran dan kerosakan yang dialami. Berdasarkan fakta kes, ukuran ganti rugi yang akan timbul secara langsung daripada pelanggaran itu ialah nilai saham yang dipertikaikan yang boleh dibeli oleh plaintif setakat 18 Mei 2016 (bukannya 28 Februari 2019). Ganti rugi ini timbul secara langsung akibat daripada pelanggaran perjanjian pemegang saham oleh defendan pertama hingga keempat. Oleh itu, terdapat hubungan perkaitan langsung antara pelanggaran yang dilakukan oleh defendan pertama hingga keempat ketika tidak menawarkan saham yang dipertikaikan kepada plaintif dengan kerosakan yang dialami oleh plaintif. Selanjutnya, kerugian yang dialami oleh plaintif berada dalam pertimbangan munasabah pihak-pihak apabila mereka memasuki perjanjian pemegang saham tersebut (lihat perenggan 29–30 & 32).]

Cases referred to

Karun Klasik Sdn Bhd v Tenaga Nasional Bhd [2023] 2 MLJ 566, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Contracts Act 1950 s 74

Steven How (with Daryl Chang and S Shahman) (Kumar Jaspal Quah & Aishah) for the plaintiff.
George Miranda (with Sam Jia Qian) (Miranda & Samuel) for the defendant.

Adlin Abdul Majid J:

INTRODUCTION

[1] Following a judgment dated 31 October 2018 obtained by the plaintiffs against the defendants ('judgment'), the plaintiffs applied to this court for damages to be assessed.

[2] For the reasons elaborated below, the court awarded general damages of RM144,322,499 to the plaintiffs.

BACKGROUND FACTS

[3] The plaintiffs claimed that the defendants had breached a shareholders' agreement dated 19 November 2010 ('shareholders' agreement'), which was executed between the first plaintiff, the third plaintiff and the first to fourth defendants. The shareholders' agreement governed their relationship as shareholders of the fifth defendant.

[4] The plaintiffs claimed the first to fourth defendants had breached the shareholders' agreement by, amongst others, transferring the first to fourth defendants' shares in the fifth defendant ('impugned shares') to the sixth defendant without the plaintiffs' consent and in breach of the right of first refusal provided for under the shareholders' agreement.

[5] The court found that there had been a breach of the shareholders' agreement, and the judgment was awarded in favour of the plaintiffs, with damages to be assessed.

TERMS OF THE JUDGMENT

[6] In assessing damages, I considered the terms of the judgment which contain amongst others, the following declarations:

(a) that the shareholders' agreement is terminated (para 1);

(b) that the first to fourth defendants and the sixth defendant have breached cll 6.1, 6.2, 6.4 and 6.5 of the shareholders' agreement, for inter alia, transferring the impugned shares without the prior written consent of the plaintiffs (para 2); and

(c) that an offer is deemed made by the first to fourth defendants and the sixth defendant to the plaintiffs pursuant to cl 12.2 of the shareholders' agreement to purchase the impugned shares valued at net tangible assets divided by the total number of ordinary shares issued amounting to a total of RM1 (para 3). As a consequence of this declaration, the court

ordered the impugned shares to be transferred to the plaintiffs (para 4). A

[7] Further, in para 6 of the judgment, the court awarded general damages for breach of the shareholders' agreement to be paid by the first to fourth defendants to the plaintiffs, whereby such damages are to be assessed by the court. The plaintiff's application for damages to be assessed relates to this paragraph. B

ASSESSMENT AND FINDINGS

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[8] As a matter of principle, an award of damages should place a plaintiff in a position as close as possible to that as if the contract for which the damages are sought had not been breached and had been performed (see the judgment of the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, at p 787H). D

[9] To put this principle into effect, I first considered the provisions of the shareholders' agreement which the court declared the first to fourth defendants and the sixth defendant had breached. These clauses are reproduced below:

(a) cl 6.1: 'For so long as PC [third defendant] and PM [Pesona Metro Sdn Bhd] shall hold any share in the Company [fifth defendant] (including without limitation any Ordinary Shares, Preference Shares or Conversion Shares), *the other Shareholders (including VS [first and 2nd defendants]) shall not sell, transfer or otherwise dispose of any shares in the Company held by them without the prior written consent of PC and PM*. The other Shareholders (including VS) shall not mortgage, charge, or otherwise encumber all or any part of their interest in their shares in the Company except with the prior written consent of PC and PM'; E F

(b) cl 6.2: 'Subject to Clause 6.1, *if any other Shareholders of the Company (including VS) wishes to sell and/or transfer its Shares to a third party, VS shall ensure that PC and PM be given the first right of refusal to purchase these shares* or be entitled (but not obliged) to sell and/or transfer up to a proportionate number (as it bears to the entire issued share capital of the Company) of its holding of Ordinary Shares (include Preference Shares and Conversion Shares, if any) to the third party *on no less favourable terms and conditions as are applicable to such other Shareholder(s)*. Upon any exercise by PC and PM of either of the foregoing entitlement, the other Shareholders shall not transfer or sell any of its shares to the third party unless the relevant shares of PC and PM are so purchased by the third party'; G H I

(c) cl 6.4: 'All third parties which acquire shares in the Company shall (unless PC and/or PM directs otherwise) enter into a deed of adherence and accession under which the third party shall agree to be bound by the

A obligations, and shall be entitled to the benefit, of this Agreement (in place of the transferor of those Shares, where applicable)'; and

(d) cl 6.5: 'The Company and VS shall ensure that the restrictions on sales, transfers and disposal of the Shares in the Company, as elaborated in this B Clause 6, shall be expressly endorsed on each share certificate issued by the Company at the point of issue of that share certificate and documentary evidence of such compliance shall be forwarded to PC and/or PM within 14 days after the date of this Agreement or the issue of each share certificate (whichever is later)'. (Emphasis added.)

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[10] Essentially, these clauses require the first to fourth defendants to seek the consent of the plaintiffs and to give the plaintiffs the first right of refusal to purchase the first to fourth defendants' shares in the fifth defendant, before the shares can be transferred to a third party (in this case, to the sixth defendant).

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[11] By the judgment, the court found that the first to fourth defendants had breached the shareholders' agreement as they had transferred the impugned shares on 18 May 2016 without the consent of the plaintiffs and without giving the plaintiffs the first right of refusal to purchase the shares. The court ordered E these shares to be transferred to the plaintiffs. The impugned shares were transferred to the plaintiffs pursuant to the judgment, on 28 February 2019.

[12] If the shareholders' agreement had not been breached, the plaintiffs F would have been given the first right of refusal and been able to purchase the impugned shares around about 18 May 2016, which is the date the shares were transferred to the sixth defendant. However, the impugned shares were only transferred to the plaintiffs pursuant to the judgment on 28 February 2019.

G **[13]** As such, the court finds that to put the plaintiffs in a position as close as possible to that as if the shareholders' agreement had not been breached, the plaintiffs should be entitled to damages calculated in the following manner:

(a) the value of the impugned shares on 18 May 2016, the date the shares H were transferred to the sixth defendant; LESS

(b) the price paid by the sixth defendant for the transfer on 18 May 2016, which would have been the consideration paid by the plaintiffs for the impugned shares had the shares been transferred to the plaintiffs; LESS

I (c) the value of the impugned shares on 28 February 2019, being the date these shares were transferred to the plaintiffs pursuant to the judgment.

[14] In assessing the value of the impugned shares on 18 May 2016, I relied on the following:

(a) two valuation reports of HVS Advisory Sdn Bhd ('HVS') one dated 20 November 2014 which valued the fifth defendant at RM201,058,771, and the other dated 20 August 2018 which valued the fifth defendant at RM423,680,281. These reports were relied on by the defendants during the trial of this matter;

(b) the testimony of the second defendant during the trial, supporting the HVS valuation report dated 20 November 2014, and agreeing that the valuation of the fifth defendant is RM200m, based on the advice of consultants; and

(c) an article dated 5 September 2016 in the Star newspaper, which quoted the chief group executive director and chief executive officer of the fifth defendant valuing the fifth defendant at RM200m, based on historical data, sales, turnover and profit.

[15] From the above evidence, I find the valuation of the fifth defendant at RM200m as at 18 May 2016, to be fair and reasonable. The value of the impugned shares, which is 75% of the share of the fifth defendant is therefore RM150m.

[16] I then took into account the price the impugned shares were transferred to the sixth defendant on 18 May 2016. This amount, derived from share transfer forms is RM5,677,500. This is the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them.

[17] Finally, I considered the value of the impugned shares on 28 February 2019, the date the shares were transferred to the plaintiffs pursuant to the judgment. To determine the value of these shares, there is a need to determine the value of the fifth defendant.

[18] Under para 4 of the judgment, the court ordered that:

(a) an independent receiver and manager and manager shall be appointed over the undertakings and assets of the fifth defendant, and to manage the fifth defendant (para 4(a)); and

(b) an independent auditor nominated by the plaintiffs shall be appointed to determine the price per share of the ordinary shares of the fifth defendant at net tangible assets/total number of ordinary shares issued (para 4(b)).

[19] Pursuant to para 4 of the judgment, Anthony Joseph Skelchy of PKF Covenant Sdn Bhd ('PKF') was appointed as an independent receiver and manager over the entire undertakings and assets of the fifth defendant, pending the purchase and transfer of the impugned shares to the plaintiffs.

[20] According to PKF's report dated 15 April 2019 on the administration of the fifth defendant for the period between 26 December 2018 to 28 February 2019, the fifth defendant had insufficient cash to meet its expenses.

[21] In addition to PKF's report, the plaintiffs also produced a special audit report dated 21 July 2020 and a valuation report dated 11 November 2021 by Vearsa Advisory Sdn Bhd, together with the fifth defendant's audited financial statements for the years ended 2018 and 2019. These reports and financial statements, read together with the PKF report, valued the fifth defendant at a nominal value of RM1, with the future acquirer having to bear the net liabilities of the fifth defendant.

[22] The reports also show that between the date of the judgment until the impugned shares were transferred to the plaintiffs on 28 February 2019, the ecosystem of the fifth defendant and its subsidiaries had been destroyed, with these companies not having any employees, management, office premises or audit records.

[23] The first to fourth defendants countered the reports produced by the plaintiffs with a report dated 30 December 2021 from Moore. However, this report does not contain a valuation of the fifth defendant. Instead, it merely provides a commentary from an accounting perspective as to whether the financial statements of the fifth defendant can be relied upon by valuers as a basis of valuation. I find the report fails to rebut the plaintiffs' claim that the fifth defendant had a nominal value at the time the impugned shares were transferred to the plaintiffs.

[24] Further and in any event, as PKF is an independent receiver and manager appointed pursuant to the judgment, I am of the view that PKF's findings on the financial status of the fifth defendant cannot be challenged by the first to fourth defendants.

[25] With the above considerations, I find that general damages awarded to the plaintiffs can be fairly calculated in the following manner:

(a) the value of the fifth defendant as at 18 May 2016 (RM200m) x 75% (the percentage of the impugned shares in the fifth defendant) = RM150m;

(b) less the price the impugned shares were transferred to the sixth defendant on 18 May 2016, which is the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them (RM5,677,500); and

(c) less the value of the impugned shares as at 28 February 2019 (the nominal value of RM1, based on the finding that the fifth defendant is valued nominally at RM1).

[26] The above calculation results in an amount of damages of RM144,322,499.

[27] I am unable to agree with the first to fourth defendants' arguments that nominal damages should be awarded. The first argument raised by the first to fourth defendants is that the sale of the impugned shares to the sixth defendant was merely a share swap exercise. It was contended that after the share swap, the first to fourth defendants owned the shares in the fifth defendant through their ownership of the sixth defendant. As such, the transfer of the impugned shares did not have any material effect on the ownership of the fifth defendant.

[28] I find this argument to be irrelevant to the issue of the calculation of general damages due to the plaintiffs. This argument ignores the implication of the breach, which is that the impugned shares were not first offered to the plaintiffs. Whether the transfer was via a share swap or otherwise, under the shareholders' agreement, the first to fourth defendants are obligated to offer shares to the plaintiffs before the shares could be transferred to a third party. Had the shares been offered to the plaintiffs, the plaintiffs would have been able to purchase the shares. Hence, damages to be awarded must reflect a scenario in which the impugned shares had been purchased by the plaintiffs on or around 18 May 2016.

[29] The second argument raised is that the damages sought do not satisfy the remoteness test. The first to fourth defendants referred to s 74 of the Contracts Act 1950, which provides that:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, *compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> (2) Such compensation is *not to be given for any remote and indirect loss or damage* sustained by reason of the breach. (Emphasis added.)

[30] The first to fourth defendants stressed that the plaintiffs must be able to show a causal connection between the breach and the damages suffered. I do not disagree.

[31] In *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2023] 2 MLJ 566, the Court of Appeal found that the measure of the appellant's damages is the profit

suffered by the appellant as a result of the unlawful disconnection of its electricity supply by the respondent:

> [44] In our considered view, the appellant rightly contended that the correct approach to assessment that the LJ should have adopted was to apply the principle that *the measure of damages should be as defined in Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 *at p 38 as 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'*.
>
> [45] Following the FC decision, the liability of TNB for the wrongful disconnection of electricity supply to the appellant's factory was a non-issue. Likewise, that the appellant had suffered damages that required assessment as a result of that incident. *We are in concurrence with the appellant that the measure of damages should be the profit that the appellant's business could have obtained from a sale of the products or the market value thereof*. The entitlement should be for the appellant to be put into the position that it would have been in had the products in the cold rooms not spoiled as a result of TNB's disconnection of the electricity supply (see *The Clyde* [1856] Swab 23 at p 24). (Emphasis added.)

[32] Similarly, in the present case, the measure of damages that would arise directly from the breach would be the value of the impugned shares that the plaintiffs would have been able to purchase on 18 May 2016 (instead of 28 February 2019). These damages arose directly as a consequence of the first to fourth defendants' breach of the shareholders' agreement. There is therefore a direct causal connection between the breach committed by the first to fourth defendants in not offering the impugned shares to the plaintiffs, with the damages suffered by the plaintiffs. Further, the damages suffered by the plaintiffs would have been within the reasonable contemplation of the parties when they entered into the shareholders' agreement.

DECISION

[33] Thus, general damages awarded to the plaintiffs are RM144,322,499, based on the calculation in para 25 above. The damages shall be paid jointly and severally by the first to fourth defendants.

Order accordingly.

Reported by K Selvaraju